



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13021/2019

THE IMMIGRATION ACTS

Heard remotely at Field House
On 27 November 2020 *via Skype for Business*

Decision & Reasons Promulgated
On 31 December 2020

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR MOHAMMAD MOTIUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Gilbert, Counsel, instructed by Martyns Rose Solicitors

For the Respondent: Mr S. Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were primarily the decision of the First-tier Tribunal, the grounds of appeal, and the supporting documents, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that the proceedings had been conducted fairly in their remote form.

1. This appeal concerns a matter of profound sensitivity, to adopt the terminology of Lord Wilson JSC at [1] of Serafin v Malkiewicz [2020] UKSC 23, namely an allegation of apparent bias against a judge, with the consequential submission that the proceedings before the First-tier Tribunal were unfair.
2. I informed the parties at the hearing that the appeal was allowed. I now give my detailed reasons.

Factual background and the decision of the First-tier Tribunal

3. The appellant is a citizen of Bangladesh born in 1979. He appeals against a decision of First-tier Tribunal Judge Khawar promulgated on 12 December 2019 dismissing his appeal against a decision of the respondent dated 18 July 2019 to refuse his human rights claim made on 23 April 2019.
4. The appellant entered this country in November 2004 with leave as a student. His leave was renewed consecutively, and on 24 February 2015, he was granted indefinite leave to remain. He applied for British citizenship shortly thereafter, but that application was refused on 27 September 2016, on the basis that he had used a proxy test taker in English language tests he purportedly sat in 2011 and 2012. The tests were administered by a company called Educational Testing Services (“ETS”).
5. Upon the appellant seeking to re-enter the United Kingdom following a return trip to Bangladesh on 31 May 2017, his indefinite leave to remain was revoked and he was granted temporary admission. On 23 April 2019, following judicial review proceedings which were settled by consent, the appellant made a human rights claim to the Secretary of State. That application was refused on 18 July 2019, and it was that refusal decision that was under appeal before the judge below.
6. The judge noted the legal framework for considering allegations of fraud during English language tests at [18] to [22], before finding at [32] that the appellant had provided a vague, internally inconsistent, and highly unlikely to be true account of having sat the English language tests himself. The tests in which the Secretary of State alleged the appellant had relied on a proxy test taker were said to have taken place in October and November 2011 and August 2012. Also at [32], the judge said:

“...There is anecdotal evidence that ETS is an American company and does not have an office in the UK/London. Therefore, it is highly improbable that [the appellant] would have found an address ‘somewhere in North London’.”

As set out below, this strand of the judge’s analysis appears to have its provenance in a question put by the judge to the appellant during the hearing.

7. The judge’s global credibility conclusions on the ETS issue were at [51], in which he concluded that the appellant had failed to provide an “innocent explanation” to refute the allegations raised by the respondent. He concluded that the respondent’s refusal of the underlying human rights claim was lawful, by reference to the

Immigration Rules and Article 8 outside the rules. The appellant failed under the suitability criteria, on account of the deception he practised to secure earlier grants of leave to remain. The appellant's removal would be proportionate for the purposes of Article 8(2) of the European Convention on Human Rights. The appeal was dismissed.

Grounds of appeal

8. The primary ground of appeal is that the judge demonstrated the appearance of bias against the appellant during the hearing before the First-tier Tribunal, through having remarked part way through the appellant's cross-examination by the presenting officer, Mr Avery, that his evidence was a "*pack of rubbish*" or a "*pile of rubbish*". It is alleged that the judge descended into the arena by taking over cross-examination at various points. The second ground of appeal is that the judge made an error of fact through reaching a finding which was unsupported by any evidence in the case and which was at odds with the documentary materials that were before the judge, concerning his views that ETS would not have an office in London.
9. Permission to appeal was granted by Upper Tribunal Judge Sheridan on both grounds.
10. The application for permission to appeal was accompanied by an attendance note prepared by counsel who represented the appellant at the hearing before the First-tier Tribunal, Mr Afzal Syed-Ali. The attendance note records the judge interrupting during cross examination on several occasions. Although that note is set out in shorthand form, it will be helpful to repeat some of its contents in full: see **Annex 1**. Mr Syed-Ali provided a witness statement in which he verified the account set out in his attendance note with a statement of truth.
11. Pursuant to the procedure outlined in Sarabjeet Singh v Secretary of State for the Home Department [2016] EWCA Civ 492, and approved by the Supreme Court in Serafin v Malkiewicz at [45], upon permission to appeal being granted on this basis, the Principal Resident Judge of the Upper Tribunal, Upper Tribunal Judge O'Connor, arranged for the judge to be invited to comment upon the allegations made in the grounds of appeal. The judge's response is set out at **Annex 2**.

Submissions

12. On behalf of the appellant, Mr Gilbert advanced a series of forensic submissions highlighting the centrality of the appellant's credibility to the allegations of fraud made against him, noting that the events in question took place some eight years before the First-tier Tribunal hearing. He highlighted that the judge referred in the decision, for example at [28], to how he had thought it necessary to rephrase the question for the appellant's benefit, but submitted that what the judge, in fact did was to "descend into the arena". This was most evident in two distinct respects, he submitted. First, by the judge's interjection during cross examination that the appellant's evidence was a "*pack of rubbish*", or a "*pile of rubbish*". Secondly, by his intervention during cross-examination in which he stated that ETS would not have had premises in London, being an American company.

13. Mr Gilbert submitted that Mr Syed-Ali's contemporaneous notes of the proceedings, supported by his witness statement, supported the appellant's submissions concerning the judge's interventions. The judge did not, highlighted Mr Gilbert, deny having intervened in the manner alleged by the appellant, but merely said that, had he done so, he would not have described the evidence as a "*pack* of rubbish", but rather as a "*pile* of rubbish". Whether it was a pile of rubbish or a pack of rubbish, submits Mr Gilbert, this was terminology which the judge should not have used during the hearing, still less during the appellant's cross-examination, which the judge did not deny having used.
14. As well as the content of the judge's intervention giving the appearance of bias, its timing was significant, submitted Mr Gilbert. The judge made those remarks part way through the appellant's cross examination. By doing so at that stage, before having heard the entirety of the evidence in the round, it indicated that the judge had a closed mind. That is not to say, accepts Mr Gilbert, that a judge is not able to express a preliminary view during a hearing; indeed, in some circumstances, it will be necessary for a judge to give the parties the opportunity to respond to a potentially operative concern held by the judge which has not been ventilated by either side: see AM (Fair hearing) Sudan [2015] UKUT 656 (IAC). However, in relation to the judge's intervention concerning the location of the ETS premises, the judge was plainly wrong; see page 158 in the appellant's bundle, which records a North London address for the offices of ETS Global. That document is a test certificate issued following one of the impugned tests.
15. Drawing the submissions together, Mr Gilbert highlighted the requirement for the appellant to provide an innocent explanation, which is not high threshold. The judge resolved the case against the appellant having expressed biased views against him during the evidence, speculating as to the unlikelihood of a global American company with extensive operations in this country having premises here, before ultimately resolving the case against the appellant in a procedurally unfair way.
16. In response, Mr Kovats accepted that it was "not wise" for the judge to have described the evidence given by the appellant as either a "pile of rubbish" or a "pack of rubbish", but that, on balance and by a fine margin, the judge was not biased against the appellant. Had he expressed his views on softer language, there could have been no complaint about that. Mr Syed Ali's note was not taken on a verbatim basis and was constructed after the event on the basis of his handwritten notes. The presenting officer who appeared before the First-tier Tribunal, Mr Avery, had not recorded any concerns with the fairness of the proceedings in his minute of the hearing. The exchange under consideration lasted for only a few moments. There was nothing in the judgment that was irrational; the mere fact that ETS may have had some offices in North London was not determinative on that point. The key issue was that the judge found the appellant to have changed his account, which was a credibility concern properly open to the judge: see [29] of the judge's decision.

Discussion

17. I accept Mr Gilbert's submissions. It is significant that the judge did not deny having used categorised the appellant's live evidence as some form of rubbish, whether a "pack" or "pile" of rubbish. It is highly significant that the judge went so far in his note at Annex 2 as to observe that, had he sought to apply the label "rubbish" to the appellant's evidence, it would have been a "pile", rather than a "pack" of rubbish. I accept Mr Syed-Ali's written account of what took place. It fits with the judge's interventions in cross-examination which, on the basis of counsel's note, appear to go beyond clarificatory points.
18. The question for my consideration is whether the fair minded observer, in possession of all the facts, would conclude that there was an appearance of bias in the conduct of the judge. The facts that would be in the possession of the fair minded observer would include the contents of the judge's note at Annex 2, which includes the judge's observation that, had he used the alleged offending language, he would have put matters slightly differently. I find that the fair minded observer would not at all be assured by the explanation given by the judge, such that it would not be possible to conclude that there was no appearance of bias. The fair minded observer would also note that the judge intervened in cross-examination, including through putting his own questions such as, "are you making it up?".
19. In WA (Role and duties of judge) Egypt [2020] UKUT 127 (IAC), a panel of the President and the Vice-President of the Upper Tribunal (IAC) held:
1. *During the taking of evidence a judge's role is merely supervisory.*
 2. *If something happens during a hearing that disrupts the normal course of taking evidence it is essential that the judge records what happened and why; who said what; and what decision the judge made and on what basis.*
20. Within the confines of that supervisory function, there is rarely scope for a judge to put to an appellant the bald allegation that the appellant is lying. In those rare circumstances where it may be appropriate, it will not be appropriate to do so against having announced, part way through the appellant's evidence, that the evidence is a "pack of rubbish" or a "pile of rubbish." The judge gave the appearance of both having made up his mind before hearing all the evidence, and of assuming the role of cross-examiner.
21. The leading authority on inquiry into the unfairness of a trial remains the judgment of the Court of Appeal, delivered by Denning LJ, in Jones v National Coal Board [1957] 2 QB 55. Both sides complained that the judge had adopted an overly interventionist approach; he took over cross-examination of some of the witnesses, to the extent that both sides complained that they had been unable properly to put their cases. The Court of Appeal upheld their complaints, noting, at page 65, that:
- "interventions should be as infrequent as possible when the witness is under cross-examination... the very gist of cross-examination lies in the unbroken sequence of question and answer..."*

The cross-examiner is:

“at a grave disadvantage if he is prevented from following a preconceived line of inquiry”

22. Interventions during evidence for more than clarificatory purposes risk the judge “descending into the area”. That is a phrase which has its origins in Yuill v Yuill [1945] P. 15 at [20], where Lord Greene MR said that a judge who, “descends into the arena... is liable to have his vision clouded by the dust of the conflict.”
23. It is clear that this judge so descended into the arena by putting his own cross-examination questions to the appellant, concerning his views on the non-existence of ETS offices in London. As Mr Gilbert points out, there was evidence before the judge emanating from ETS with a London-based address. By descending into the arena, and putting questions to the appellant in cross-examination which the presenting officer himself had not sought to pursue, the judge overlooked documentary evidence in the case which clearly undermined the questions he sought to ask.
24. The judge strayed beyond the appropriate boundaries of judicial supervision during evidence.
25. I reject Mr Kovats’ arguments that the judge reached a conclusion that was open to him. First, an operative part of the judge’s analysis, namely whether ETS would have office premises in London, was based on a simple mistake of fact. Secondly, a judgment that results from a hearing in which the judge strayed beyond his judicial remit, giving the appearance of being biased through announcing that the appellant was telling lies part way through his evidence and taking over parts of the cross-examination, is tainted. As the Supreme Court observed at [49] of Serafin, “a judgment which results from an unfair trial is written in water”. In that case, the Supreme Court described the impugned judgment of the High Court as “intricately constructed and beautifully written”: see [44].
26. The entirety of the decision of the First-tier Tribunal is set aside with no findings of fact preserved. As the appellant has been deprived of a fair hearing, pursuant to paragraph 7.2(a) of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, the appropriate course is for this matter to be remitted to the First-tier Tribunal.

Notice of Decision

The decision of Judge Khawar involved the making of an error of law and is set aside with no findings of fact preserved.

The matter is remitted to the First-tier Tribunal to be re-heard by a different judge.

No anonymity direction is made.

Signed *Stephen H Smith*
Upper Tribunal Judge Stephen Smith

Date 17 December 2020

ANNEX 1

Extract from the note taken by Mr Syed-Ali, Counsel for the appellant at the First-tier Tribunal

PO stands for presenting officer. Square brackets in the original.

1. PO: "did you do anything when you came to know the certificate was not genuine"
Ans: "had to travel and it was not in mind, I was confident I took my test"
2. PO: "what was family situation"
Ans: "I was fully confident nothing happened to me". PO repeats Q. Ans: "I chased up ETS several times.
FTJ interposed: how did get in contact? Did you send them an email?
Ans: no
3. FTJ: "are you making it up". [FTJ commented "twice by me and twice by PO you are asked and you're not sure what you did"].
[Appellant sought clarification and answered], "when, after my refusal of nationality".
"I contacted... Find out the telephone number, nobody picked up the phone, ETS online website gave the number".
4. At this point FTJ interrupted answer and asked "what did you do when no one answered".
Ans: "when? I couldn't... Their office... I find out the address... I went there..."
5. FTJ: "where was it".
Ans: "North London... But cannot remember... Forgot".
- 6 FTJ: you cannot remember? Which underground you used?
Ans: I went there with a friend, did not use tube, with his car. Syed Shamim, I can bring him..."
7. FTJ commented "we have a pack of rubbish".
8. [I objected to this observation and asked the court to consider the evidence holistically and evidence has not come to an end. FTJ asked me "what do you think Mr Ali, of course ETS is an American company, there would be no office in UK". I responded "I will reserve my positions on US companies having UK offices and I will address in submissions and so far as my position is concerned I will submit appellant has given credible account" FTJ said "that you will do".]
9. FTJ: did you write to them?
Ans: no. Try to find their office, did not have email did not try.
10. PO: 16/11/2011 - Charles Edward College, you remember the day of the examination?
[Appellant gave detailed description of travel to centre and attendance; I did not take detailed notes, his evidence was not contested/challenged]
Ans: 14 - 15 students - individuals, next to my seat was empty, nobody was there. I did not see any cheating going on... Very strict... Two people was God - inside room, I never saw any suspicious thing [in my handwritten notes at this point there is a reference a 3, this must be a reference to a page in bundle]
11. [PO asked about to confirm photocopy of a document in bundle]
12. PO: why did you find the exam [I sought clarification and PO rephrased 'why did you take this exam']
Ans: limited time to get certificate, other tests were not sure.
13. PO: what scores you got?
Ans: I fail the test, writing 150, speaking on 70, failed writing test, 8/9 years back, can't remember all. After failing writing, took lots of mock test, no course attended, online test...

14. PO: where did you live at that time?

Ans: at that time I was on Bow Road

15. How did you travel on test day?

Ans Hounslow – by train – one change Hammersmith – Piccadilly line

16. PO: why did you go to Birmingham Aston College?

Answer: I was not living in Birmingham, a friend found it. I could not find a college [to take the test on suitable date] he suggested me to go there.

17. PO: fee you paid to Charles Edward College?

Ans: £150 cash. They gave me a receipt. Normally I don't keep receipts. Sometimes Syed Shamim took test. I did not ask him if he had ETS problem. It a personal matter. After my rejection of ILR he knows about my problems.

18. PO: at tested they check who you work?

Ans: check my passport in reception – in class

FTJ: where were you in October 2011, in Birmingham?

Ans: in October 2011 I was not living in Birmingham."

ANNEX 2

HOPO stands for Home Office Presenting Officer

Extract from a letter from Judge Khawar to the Principal Resident Judge, Upper Tribunal (IAC), 19 August 2020

"1. I understand the time requested to provide only information as to what happened at the hearing and questions of law in relation to the appellant's application are a matter for the Upper Tribunal. My recollections are as follows:

2. Shortly after the appellant's evidence, I formed the impression that the appellant may not have understood Mr Avery's (HOPO's) questions and sought to assist the appellant by rephrasing questions, in a simplified manner, in relation to whether or not he contacted ETS. This is borne out by my handwritten ROP notes and referred to in the decision.

3. Immediately after my aforesaid attempts to assist and in a conversation with Mr Syed-Ali (appellant's counsel) I indicated that I was satisfied the appellant had understood the questions posed and my provisional view that I thought the appellant was not providing a truthful account. I do not recall using the words "pack of rubbish". In any event, if I had used such words, it would have been "pile of rubbish", had I spoken in the vernacular.

4. During the conversation with Mr Syed-Ali, which was brief, lasting no more than a few seconds, Mr Syed-Ali properly objected that the whole of the appellant's account should be heard before concluding adverse credibility. I wholeheartedly agreed with him and informed him that I had not come to any conclusion about the appellant's credibility as a whole and would only do so after I had heard all of the appellant's oral evidence and also taken into account his witness statements and documents filed, the respondent's documentary evidence and indeed and [sic] interview which had been conducted at the airport, upon the appellant seeking re-entry. Having explained this to Mr Syed-Ali, the appeal continued without anything else of any significance (if the

above is considered significant), occurring during the remainder of the hearing, which, from my recollection, lasted approximately one and a half hours.

5. At paragraphs 24 to 51 of the decision I have particularised all of my reasons for the adverse credibility findings. I did not know Mr Rahman prior to this appeal and did not/do not have, any reason to have been biased against him.

6. I should add I have been assisted in my recollections of the hearing by re-reading the decision, the type notes provided by the appellant in relation to the part of the oral evidence complained of, my handwritten notes (the [Record of Proceedings]) and the grounds of appeal. Unfortunately, I am unable to decipher Mr Syed-Ali's handwritten notes of the evidence and I have not seen the full tribunal file. However, I suspect, neither of these handicaps is likely to impact on my recollection of events."